Supreme Court, U.S.
FILED
DEC 5 - 2003
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No. 03-363

IN THE SUPREME COURT OF THE UNITED STATES

DANNY JOE MCGEE, III,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR REHEARING

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Attorney For Petitioner

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CERTIFICATION OF COUNSEL

I, Kevin Bernard Howard, counsel of record for Petitioner and pursuant to Rules 44.1 and 44.2 of this Court hereby certify that the attached and foregoing Petition For Rehearing is limited and restricted to the grounds stated in Rule 44.2, and is presented in good faith and not for delay.

Respectfully submitted,

_____

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QUESTIONS PRESENTED FOR REVIEW

1. Whether warrantless arrest of Petitioner by routine street police officer pursuant to what initially began as an investigation of an anonymous information alleging crack cocaine sales was unreasonable under the Fourth Amendment to the United States Constitution.

2. Whether warrantless strip visual or digital anal cavity search of Petitioner following warrantless arrest by routine street police officer pursuant to what initially began as an investigation of an anonymous information alleging crack cocaine sales was unreasonable under the Fourth Amendment to the United States Constitution absent exigent circumstances where the search was not conducted at a border crossing, penal institution, hospital, police station house or jail facility

PETITION FOR REHEARING

GROUNDS FOR GRANTING REHEARING

This court should reconsider and rehear Petitioner's Petition For Writ Of Certiorari for the following substantial reasons:

1. There is no Supreme Court precedence that upholds a warrantless anal cavity search of the nature performed in this case under the factual circumstances of this case as to time, place, manner and justification for the search.

2. Although the actions of Petitioner in storing contraband in his anal cavity is unquestionably despicable behavior and should not be rewarded, that fact alone should not in any way minimize the Constitutional rights guaranteed to Petitioner by the U. S. Constitution and in particular the U. S. Constitution Amend. IV.

3. By summarily denying Petitioner's petition, this Court is establishing new precedence that will be cited throughout the land as controlling authority even though the decision below is in conflict with all of the underlying Constitutional search and seizure principles consistently enunciated and applied in precedence established by this Court beginning with *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966).

4. This Court should at least state in an opinion why, in this case of an invasion of privacy to one of the most extreme degrees by means of what at a minimum is categorized as a visual anal cavity search, there is no requirement of even a cursory analysis of the warrantless search and seizure principle of exigent circumstances or why apparently there is an exception that forms the basis for the justification for the lack of the need for exigent circumstances under the facts of this case.

5. In this case, the arresting officer stated in his own words that he had made no decision to arrest Petitioner prior to the

discovery of the narcotics.

Q. Okay. So from the time you picked them up at the street to the time you get to the police station I mean to the fire station you're still doing an investigation right?
A. Yes.
Q. And what are you investigating for?
A. The street sales of crack cocaine.

[R.R. Vol. 2, page 82, lines 6-12]

Q. Okay. Is your investigation to discover sale of crack cocaine or possession of crack cocaine?
A. Actually both.

[R.R. Vol. 2, page 82, lines 18-20]

Q. Okay. So you hadn't made no decision to arrest anyone when you put them in your car correct?
A. I had made no decision to arrest or charge anyone, yes that is correct.
Q. With anything?
A. With anything at that time, yes.

[R.R. Vol. 2, page 80, lines 2-7]

Q. Now, once you found the cocaine is that when you formally put Mr. McGee under arrest?
A. Yes at that time he was placed under arrest.
Q. Prior to that time he was just an investigation and you were not arresting him?
A. It was a continuing investigation, yes.

[R.R. Vol. 2, page 85, lines 11-16]

This fact would suggest that in the officer's mine, at the time he

conducted the search of Petitioner and his juvenile companions at a public fire station, the search was not being conducted on reasonable suspicion due to security needs because Petitioner was being placed in a jail holding cell, detention center or police station, but for the sole impermissible purpose of the mere chance that contraband might be found. *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966), *Nelson v. McMullen*, 207 F.3rd 1202, 1206-1207 (10th Cir. 2000).

CONCLUSION

This is a very important search and seizure case. The facts of this goes into territory not previously addressed by this court. Additionally, the decision of the Court below is wrong.

For all of the reasons stated above, Petitioner Danny Joe McGee, III requests a rehearing and after such rehearing requests that his petition for a writ of certiorari be granted.

Respectfully submitted,

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